714c

44 pgs

(10)

FILED
JUN 28 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-984

IN THE

Supreme Court of the United States

JOSE ERNESTO MEDELLIN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

BRIEF OF FORMER UNITED STATES DIPLOMATS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DONALD B. AYER
CHARLES R.A. MORSE
CHRISTIAN G. VERGONIS
CHARLES T. KOTUBY, JR.
JONES DAY
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

HAROLD HONGJU KOH
(Counsel of Record)
HOPE R. METCALF
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN RIGHTS CLINIC—
NATIONAL LITIGATION PROJECT
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06510
(203) 432-1660

Counsel for Amici

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. TEXAS MUST COMPLY WITH THE PRESIDENT'S DIRECTIVE THAT STATE COURTS GIVE EFFECT TO THE ICJ'S *AVENA* DECISION 5

II. TEXAS MUST COMPLY WITH TREATY OBLIGATIONS TO GIVE EFFECT TO DECISIONS OF THE ICJ, EVEN APART FROM THE PRESIDENT'S *AVENA* DIRECTIVE 13

A. The Supremacy Clause Binds Texas To Obey The Nation's Treaty Commitments 13

B. The Treaty Power Exists In Its Present Form Precisely Because The Framers Wished To Keep States From Interfering With The National Government's Conduct Of Foreign Relations 17

III. TEXAS'S REFUSAL TO COMPLY WITH THE VIENNA CONVENTION, THE *AVENA* DECISION, AND THE PRESIDENT'S *AVENA* DIRECTIVE UNDERMINES U.S. DIPLOMATIC CREDIBILITY AND DAMAGES U.S. FOREIGN POLICY INTERESTS 21

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Federal Cases

American Insurance Ass'n v. Garamendi, 539 U.S. 396 (2003) 10, 11
Asakura v. City of Seattle, 265 U.S. 332 (1924) 20
Breard v. Greene, 523 U.S. 371 (1998) 16
Canada v. S.D. Myers, Inc., 2004 Fed. C.C. LEXIS 20 (Fed. Cl. Jan. 13, 2004) 27
Crosby v. National Foreign Trade Council, 530 U.S. 363 (2000) 1, 21, 24
Dames & Moore v. Regan, 453 U.S. 654 (1981) 9, 10, 12
Department of Transportation v. Public Citizen, 541 U.S. 752 (2004) 27
Federal Power Commission v. Tuscarora Indian Nation, 362 U.S. 99 (1960) 2
Hauenstein v. Lynham, 100 U.S. 483 (1879) 20
Head Money Cases, 112 U.S. 580 (1884) 26
Hilton v. Guyot, 159 U.S. 113 (1895) 28
Jogi v. Voges, 480 F.3d 822 (7th Cir. 2007) 13
Kolovrat v. Oregon, 366 U.S. 187 (1961) 26
Medellin v. Dretke, 544 U.S. 660 (2005) 14
Olympic Airways v. Husain, 540 U.S. 644 (2004) 26
Sanchez-Llamas v. Oregon, 126 S. Ct. 2669 (2006) 3, 14, 16
Sanitary District v. United States, 266 U.S. 405 (1925) 13
Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) 26
Terlinden v. Ames, 184 U.S. 270 (1902) 13
United States v. Belmont, 301 U.S. 324 (1937) 7, 8, 11, 21
United States v. Minnesota, 270 U.S. 181 (1926) 13
United States v. Pink, 315 U.S. 203 (1942) 7, 8, 10, 21
United States v. Rauscher, 119 U.S. 407 (1886) 26

TABLE OF AUTHORITIES
(Continued)

Page

United States v. Schooner Peggy,
5 U.S. (1 Cranch) 103 (1801) 16
Valentine v. United States ex rel. Neidecker,
299 U.S. 5 (1936) 7
Ware v. Hylton, 3 U.S. (3 Dall.) 199 (1796) 20
Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 8–9, 11

Constitutions, Treaties, Statutes and Regulations

Articles of Confederation and Perpetual Union,
art. IX 17
U.S. Const. art. I, § 10 19
U.S. Const. art. II, § 2 ..... 17, 19
U.S. Const. art. II, § 3 6
U.S. Const., art. VI 6, 14, 20
28 C.F.R. § 50.5 ..... 14, 15
Charter of the United Nations, *entered into force*
Oct. 24, 1945, 59 Stat. 1031 ..... *passim*
Convention Defining and Establishing the Functions
and Privileges of their Respective Consuls and
Vice Consuls, Nov. 14, 1788, U.S.-France,
8 Stat. 106, 7 Bevans 794 20
Convention on International Civil Aviation, *opened*
for signature Dec. 7, 1944, 3 Bevans 922,
84 U.N.T.S. 295 27
Great Britain-USA, Treaty of Amity, Commerce, and
Navigation ("Jay Treaty") (1795), 8 Stat. 116 26
International Air Transport Agreement, *opened for*
signature Dec. 7, 1944, 3 Bevans 922,
84 U.N.T.S. 389 26–27
North American Free Trade Agreement, ch. 11,
Sept. 6, 1992, 32 I.L.M. 605 (1993) 27

TABLE OF AUTHORITIES
(Continued)

Page

Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 ..... *passim*
Patent Cooperation Treaty, *opened for signature* June 19, 1970, 28 U.S.T. 7645, 1160 U.N.T.S. 389 26
Statute of the ICJ, 59 Stat. 1055, T.S. 993 (1995) ..... *passim*
Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, 63 Stat. 2255, 70 U.N.T.S. 171 26
Treaty of Peace with Great Britain, Sept. 3, 1783, 12 Bevans 8 18
Universal Copyright Convention, *opened for signature* Sept. 6, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 132 26
Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 ..... *passim*

Legislative, Agency & Executive Materials

In re Makie, 5 O.R.W. 546, 1989 WL 265326 (N.O.A.A. Aug. 31, 1989) 12
In re Michigan Fishing Corp., 6 O.R.W. 380, 1991 WL 288726 (N.O.A.A. May 9, 1991) 12
26 Op. Atty. Gen. 113 (1907) 7
President's Statement on Steel, *available at* http://www.whitehouse.gov/news/releases/2003/12/20031204-5.html (Dec. 4, 2003) 27–28
S. Exec. Rep. No. 91-9 (1969) 14
U.S. Dep't of State, Bureau of Consular Affairs, *Consular Notification and Access: Instructions for Federal, State, and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, pt. 3, Questions About Failure to Notify, *available at*

TABLE OF AUTHORITIES
(Continued)

Page

http://www.travel.state.gov/law/consular/consular_748.html#failure 12
U.S. Dep't of State, *Foreign Affairs Manual* 15
U.S. Dep't of State, NAFTA Investor-State Arbitrations, http://www.state.gov/s/l/c3439.htm 27

Decisions of Foreign Courts and International Tribunals

Bosnian Genocide Case, 2007 I.C.J. No. 91 15
Case Concerning Aerial Incident of July 3, 1988 (Iran v. U.S.), No. 79, 1989 I.C.J. 132 (Dec. 13, 1989) 28
Case Concerning Aerial Incident of July 3, 1988 (Iran v. U.S.), No. 79, 1996 I.C.J. 9 (Feb. 2, 1996) 28
Case Concerning Avena & Other Mexican Nationals (Mex. v. U.S.), No. 128, 2004 I.C.J. 12 (Mar. 31, 2004) ..... *passim*
Case Concerning Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. U.S.), No. 67, 1984 I.C.J. 246 (Oct. 12, 1984) 11
Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), No. 76, 1989 I.C.J. 15 (July 20, 1989) 27
LaGrand Case (F.R.G. v. U.S.), No. 104, 2001 I.C.J. 466 (June 27, 2001) 12
Trial of Pakistani Prisoners of War (Pak. v. India), No. 60, 1973 I.C.J. 328 (July 13, 1973) 28

Other International Materials

Canada Dep't of Foreign Affairs and International Trade, NAFTA-Chapter 11-Investment, http://www.dfait-maeci.gc.ca/other/invest-en.asp 27

TABLE OF AUTHORITIES
(Continued)

Page

Ramon Martinez Villareal v. United States, Case 11.753, Report No. 52/02, Inter-Am. C.H.R. (2002) 23
Resol. On the Death Sentence Handed Down on Greg Summers in Texas, USA, B4-0188/99, 1999 O.J. (C 150) 23
Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU) of the World Trade Organization, *entered into force* Jan. 1, 1995, *in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, Apr. 15, 1994, 33 I.L.M. 1125 (1994) 27
United Nations Conference on Consular Relations: Official Records, U.N. Doc. A/Conf. 2 5/6, U.N. Sales No. 63.X.2 (1963) 14
World Trade Organization, Chronological list of dispute cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm 27

Miscellaneous

Amnesty Int'l, *The Execution of Angel Breard: Apologies Are Not Enough, available at* http://web.amnesty.org/libary/Index/engAMR5102 71998 (May 1, 1998) 22
Armando Villafranca, *Life and Death Chasm*, Hous. Chron., Sept. 28, 1997, at A1 24
Barbara Crossette, *For First Time, U.S. Is Excluded from U.N. Human Rights Panel*, N.Y. Times, May 4, 2001, at A1 24
Brian Knowlton, *Execution Pits Mexico Against U.S.: Fox Echoes World on the Death Penalty*, Int'l Herald Trib., Aug. 16, 2002, at 1 22

TABLE OF AUTHORITIES
(Continued)

Page

Brief of the United States as *Amicus Curiae* Supporting Petitioner, *Medellin v. Texas*, No. 06-984, 2007 WL 923105 (Mar. 22, 2007) 16
Colin Nickerson, *Canadians Protest a Texas Execution; Inmate Set to Die Today for 1975 Killing*, Boston Globe, Dec. 10, 1998, at A2 22
Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 Am. J. Int'l L. 434 (2004) 28
Connie de la Vega, *Going it Alone*, Am. Prospect, July 2004, at A22 25
David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) 17–20
David Schwartz, *Plan to Execute German Killers Attracts Scrutiny*, Dallas Morning News, Feb. 22, 1999, at A1 22
David Stout, *Do as We Say, Not as We Do: U.S. Executions Draw Scorn from Abroad*, N.Y. Times, Apr. 26, 1998, § 4 (Week in Review), at 4 23
The Federalist No. 22 (Alexander Hamilton) 19
The Federalist No. 42 (James Madison) 20
Frederick W. Marks III, *Independence on Trial, Foreign Affairs and the Making of the Constitution* (1973) 17
Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice, in* The International Court of Justice at a Crossroads (Lori F. Damrosch ed., 1987) 26
George Boehmer, *Killer Loses Fight for Life*, Daily Telegraph (Sydney, Australia), Mar. 4, 1999, at 25 22

TABLE OF AUTHORITIES
(Continued)

Page

George Ticknor Curtis, *History of the Origin, Formation, and Adoption of the Constitution of the United States* (1854) 19
Ginger Thompson, *An Execution in Texas Strains Ties with Mexico and Others*, N.Y. Times, Aug. 16, 2002, at A6 22
John Lord Sheffield, *Observations on the Commerce of the United States* (Dublin, Luke White 2d ed. 1784) 19
Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 Am. J. Int'l L. 666 (1998) 25
Kevin Sullivan, *Mexico Challenges U.S. on Death Penalty Cases*, Wash. Post, Jan. 10, 2003, at A17 23
Laura LaFay, *World Court—U.S. to Halt Execution*, Virginian-Pilot, Apr. 10, 1998, at A1 23
Letter from Duke of Dorset to American Commissioners (Mar. 26, 1785) 19
Letter from Madeleine Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998) 25
Mexico's Fox to Insist US Honor World Court Ruling, Reuters, April 4, 2004 23
Oklahoma Gov. Commutes Mexican's Death Sentence, Reuters, May 14, 2004 23
Raymond Bonner, *Mexican Killer is Refused Clemency by Oklahoma*, N.Y. Times, July 21, 2001, at A8 22
The Records of the Federal Convention of 1787 (Max Farrand ed., rev. ed. 1937) 19
Roger Cohen, *U.S. Execution of German Stirs Anger*, N.Y. Times, Mar. 5, 1999, at 14 22
Samuel B. Crandall, *Treaties, Their Making and Enforcement* (1904) 18

TABLE OF AUTHORITIES
(Continued)

Page

Somini Sengupta, *Appeal in Murder Cites International Treaty*, N.Y. Times, Dec. 23, 1997, at B5 23

U.S. Boosts Security in Honduras as Tempers Flare, Reuters Apr. 24, 1998 24

STATEMENT OF INTEREST[1]

Amici curiae have served as senior State Department officials, ambassadors, and legal advisers, representing the government of the United States at home and abroad in both Republican and Democratic administrations.[2] *Amici* seek to present their views on the important issues raised by this case in light of this Court's recognition that the "opinions of senior National Government officials are competent and direct evidence of the frustration of [national] objectives by" the acts of a state government. *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 385 (2000).

Amici vary widely in their views regarding the scope of executive authority under the U.S. Constitution and the merits of the International Court of Justice's interpretations of the Vienna Convention in its ruling in *Case Concerning*

---

[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] *Amici*, who also previously filed an amicus brief in support of Petitioner in *Medellin v. Dretke* (No. 04-5928), include: former Secretary of State Madeleine K. Albright, former Deputy Secretary of State Strobe Talbott, former Under Secretary of State Thomas R. Pickering, former ambassadors Stephen W. Bosworth, Jeffrey Davidow, James R. Jones, J. Stapleton Roy, Wendy Sherman, Nancy Soderberg, Malcolm R. Wilkey, and Frank G. Wisner, former Legal Advisers Herbert J. Hansell and Abraham D. Sofaer, and Special Presidential Envoy James C. O'Brien. Of their number, four have retired with the rank of Career Ambassador, the highest rank that can be conferred upon members of the United States Foreign Service. Ambassador Wilkey and Legal Adviser Sofaer were formerly federal judges, on the U.S. Court of Appeals for the D.C. Circuit and the U.S. District Court for the Southern District of New York, respectively. *Amici* appear in their personal capacities; their current affiliations are provided here for identification purposes only, and are not intended to convey the views of their affiliated institutions on the questions presented. A comprehensive list of the qualifications of *amici* appears in the Addendum to this brief.

Avena & Other Mexican Nationals (Mex. v. U.S.), No. 128, 2004 I.C.J. 12 (Mar. 31, 2004). *Amici* also vary widely in their views regarding whether the death penalty can ever be lawfully administered and do not express any opinion on the appropriate resolution, after review and reconsideration, of Petitioner's challenge to his conviction and sentence. But all *amici* agree, first, that the United States is obliged to abide by International Court of Justice ("ICJ") decisions, such as *Avena*, that were rendered while the United States was a party to the Optional Protocol Concerning the Compulsory Settlement of Disputes, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487 [hereinafter Optional Protocol]; second, that the President has the constitutional authority to enforce that international obligation, particularly where, as here, the Senate has authorized him to do so through multiple treaties; and third, that allowing the Texas courts to disregard the nation's treaty commitments and the President's considered determination that state courts should give effect to the *Avena* decision would significantly impair the credibility of American diplomats in the international arena.

Amici believe that "[g]reat nations, like great men [and women], should keep their word." *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). This Court should reverse the decision below, which cannot be squared with the Supremacy Clause of the U.S. Constitution, past precedents of this Court, orderly maintenance of our diplomatic relations and sovereign commitments, and critical U.S. interests that are governed by other treaty regimes.

SUMMARY OF ARGUMENT

In January 2003, the Mexican government brought suit against the United States in the ICJ under the Optional Protocol, to which both Mexico and the United States were

then parties.[3] The suit alleged that the United States had violated the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention], in the case of Petitioner Jose Ernesto Medellin, among others.[4] After full briefing and oral argument, on March 31, 2004, the ICJ issued a final judgment holding that the United States had violated the Vienna Convention by failing to inform fifty-one identified Mexican nationals, including Petitioner, "of their rights" under the Convention and determining that the United States should "allow the review and reconsideration of [the nationals'] conviction[s] and sentence[s] by taking account of the violation of the rights set forth in the Convention." *Avena*, 2004 I.C.J. at 59.

On February 28, 2005, acting through a memorandum to the Attorney General (the "*Avena* Directive"), President George W. Bush determined that the United States would comply with its international obligation to give effect to the ICJ's decision by granting the fifty-one identified Mexican nationals review and reconsideration in the state courts.

---

[3] The Optional Protocol provides that any disputes "arising out of the interpretation or application of the [Vienna] Convention shall lie within the compulsory jurisdiction of the International Court of Justice." Optional Protocol, *supra*, art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. On March 7, 2005, shortly after the President issued the directive at issue in this case, the United States gave notice of its withdrawal from the Optional Protocol. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2675 (2006).

[4] The Vienna Convention requires all state parties, including the United States, to inform "without delay" any detained foreign national of his right to request assistance from the consul of his own nation and, if the national so requests, to inform "without delay" the consular office of that national's detention or arrest. *Id.* art. 36. Notwithstanding these obligations, Texas authorities arrested, tried, convicted, and sentenced to death Petitioner Jose Ernesto Medellin – a Mexican national – without informing him of his right to seek assistance from the Mexican Consulate.

Petitioner attempted to secure review in the Texas courts, but the Court of Criminal Appeals refused to give effect to either the *Avena* directive (which it believed exceeded the President's powers) or the *Avena* decision.

Amici submit that the Texas Court of Criminal Appeals erred in three ways. First, the court's ruling improperly flouted the *Avena* Directive, a valid presidential order issued pursuant to multiple treaties and binding on state courts under the Supremacy Clause. In directing compliance with the ICJ's judgment, the President acted pursuant to three interconnected treaties previously made by his predecessors with the advice and consent of the Senate—the Vienna Convention, the Optional Protocol, and the United Nations Charter (together with the annexed ICJ Statute). The *Avena* Directive fell squarely within the President's well-settled constitutional authority to resolve disputes with other nations pursuant to congressional mandate. In a line of cases dating back seventy years, this Court has held that the States are bound when the President settles disputes with foreign nations by entering executive agreements that resolve individual claims, especially when those agreements have been approved by Congress as a whole or by the Senate, exercising its advice and consent authority. *A fortiori*, the States must be bound when the President exercises the specific authority of resolving a particular international dispute by implementing the specific terms of an ICJ ruling issued under the authority of three Senate-approved treaties.

Second, even without an explicit presidential action implementing specific treaty obligations, the Texas court's ruling independently violated the terms of ratified U.S. treaties which, by their own force, also bind the several States. From the Founding until the present, U.S. diplomats charged with carrying out important foreign policy objectives have depended upon the federal government's ability to enforce the nation's treaty obligations. In drafting the Constitution, the Framers sought to avoid the failings of the Articles of Confederation by ensuring that the federal

government had authority to bind the entire nation, including the individual States, to our international commitments. By violating ratified treaties, the decision of the Texas Court of Criminal Appeals in this case offends the Framers' constitutional vision and promotes precisely the kind of diplomatic failure that originally prompted the creation of the treaty power.

Third, the decision below disrupts not just the proper allocation of constitutional power, but also the sound conduct of U.S. foreign policy. Left undisturbed, the state court's ruling will damage the United States' diplomatic credibility and jeopardize its global reputation as a dependable treaty partner. The lower court's ruling thus undermines important foreign policy interests embedded in treaties and threatens our nation's capacity to participate effectively in other treaty regimes. As American diplomats, *amici* have pursued and secured treaty arrangements that confer jurisdiction upon the ICJ and other international dispute-settlement bodies, arrangements that will inevitably multiply as American interests grow more global. The United States can neither build nor benefit from such arrangements if States and localities are free to ignore considered presidential directives and to violate ratified treaties.

ARGUMENT

I. TEXAS MUST COMPLY WITH THE PRESIDENT'S DIRECTIVE THAT STATE COURTS GIVE EFFECT TO THE ICJ'S *AVENA* DECISION

In determining that the United States has an "international obligation[]" to comply with the ICJ's *Avena* decision, and that this obligation should be discharged "by having state courts give effect to th[at] decision," Pet. App. 187a, the President acted pursuant to three treaties previously ratified by the Senate—the United Nations Charter (with its annexed ICJ Statute), the Vienna Convention, and the

Optional Protocol.[5] These treaties operate together to impose upon the United States (and its treaty partners) the obligation to comply with ICJ decisions in "[d]isputes," such as *Avena*, "arising out of the interpretation or application of the [Vienna] Convention." Optional Protocol, *supra*, art. I, 21 U.S.T. at 326, 596 U.N.T.S. at 488. The *Avena* Directive falls squarely within the President's constitutional authority to take those steps he deems necessary to carry out this treaty obligation.

The Constitution specifies not only that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land," U.S. Const. art. VI, but also that it is the President's duty to "take Care that the Laws [including ratified treaties] be faithfully executed," *id.* art. II § 3. The three treaties at issue here impose upon the United States the obligation to comply with the ICJ's judgment in *Avena*, and it follows that the President has the authority to bring the nation, including the several States, into

---

[5] In 1945, the United States accepted the duty to comply with ICJ judgments when the Senate advised and consented to ratification, as a treaty under Article II of the Constitution, of the Charter of the United Nations, *entered into force* Oct. 24, 1945, 59 Stat. 1031 [hereinafter U.N. Charter], and the Statute of the ICJ, 59 Stat. 1055, T.S. 993 (1945) [hereinafter ICJ Statute], which is annexed to and an integral part of the U.N. Charter. *See* U.N. Charter, *supra*, art. 93(1) (declaring all U.N. Members to be *ipso facto* parties to the ICJ Statute). The ICJ is the "principal judicial organ of the United Nations," *id.* art. 92, and "[e]ach Member of the United Nations undertakes to comply with the decision of the [ICJ] in any case to which it is a party," *id.* art. 94(1). Pursuant to the ICJ Statute, the *Avena* decision has binding force between the United States and Mexico with respect to Petitioner Medellin and the fifty other Mexican nationals named in the ICJ's judgment. *See Avena*, 2004 I.C.J. at 123; ICJ Statute, *supra*, art. 59 (decisions of the Court have "no binding force *except between the parties and in respect of that particular case*" (emphasis added)).

The Vienna Convention and the Optional Protocol were favorably transmitted to the Senate by President Richard Nixon on May 5, 1969, and quickly ratified on October 22, 1969.

compliance. *See, e.g.*, *Valentine v. United States ex rel. Neidecker*, 299 U.S. 5, 8–9 (1936) (holding that the President lacks the inherent authority to extradite a U.S. national, but that he may do so on the authority of a treaty); 26 Op. Atty. Gen. 113, 116 (1907) (noting that, "in the absence of any provision by Congress to effect th[e] object" of a treaty, "the President would be authorized and obliged by his duty as executive head of the nation under the Constitution to discharge the obligation [that the treaty imposes] upon the nation").

The *Avena* Directive falls squarely within the President's well-settled constitutional authority to resolve disputes with other nations. In a line of cases dating back seventy years, this Court has held that the President may enter executive agreements to settle disputes with foreign nations involving the claims of particular individuals.

This Court broadly endorsed that power in a pair of cases arising out of President Roosevelt's decision to recognize the Soviet Union. *See United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937). In those cases, President Roosevelt had, without involving Congress, entered into a sole executive agreement with the Soviet Union (known as the Litvinov Agreement) that, among other things, recognized the Soviet government's decision to nationalize certain property belonging to Russian citizens, including bank accounts in the United States. The Litvinov Agreement assigned to the United States all of the Soviet Union's claims against U.S. entities arising out of the nationalization. Arguing that the nationalization violated public policy, certain New York banks and the Superintendent of Insurance of the State of New York (who had taken control of some of the affected assets) cited New York law to resist the federal government's effort to recover on assigned Soviet claims. The Court rejected the state officials' argument and held that it "may not be doubted" that "[t]hat the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were

within the competence of the President." *Belmont*, 301 U.S. at 330; *see also Pink*, 315 U.S. at 222–23.

In *Belmont* and *Pink*, the sole executive agreement was specifically authorized by the President's textual Article II authority to recognize foreign governments, and hence overrode New York's efforts to void as against public policy the Soviet nationalization of assets located in the United States. This Court therefore rejected the New York parties' effort to interpose New York law as a bar to recovery of the assets in a legal proceeding and held that "complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states. In respect of all international negotiations and compacts, and in respect of our foreign relations generally, *state lines disappear.*" *Belmont*, 301 U.S. at 331 (emphasis added and internal citation omitted).

Five years later, in *United States v. Pink*, the Court considered the same argument again and resoundingly reaffirmed its prior conclusion:

> [S]tate law must yield when it is inconsistent with, or impairs the policies or provisions of a treaty or of an international compact or agreement. . . . [The treaty power] need not be so exercised as to conform to state laws or state policies, whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.

315 U.S. at 230–31, 233–34.

One decade after *Pink*, Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* famously explained that the President's authority to act in foreign affairs "is not fixed, but fluctuate[s]," depending upon whether Congress has spoken on the matter at issue.

343 U.S. 579, 635 (1952) (Jackson, J., concurring). When the President's powers are exercised in accordance with expressed or implied authority from Congress, Justice Jackson explained, the executive power is at its zenith, as his action "would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Id.* at 637.

Three decades later, in *Dames & Moore v. Regan*, this Court explicitly applied Justice Jackson's *Youngstown* analysis to uphold the legality of a presidential order to implement the terms of an executive agreement resolving claims between the United States and Iran by suspending and transferring to binding arbitration before a newly created Iran-United States Claims Tribunal hundreds of private claims by U.S. nationals pending in American courts. 453 U.S. 654, 663–64 (1981); *see also id.* at 669 (finding Justice Jackson's categories "analytically useful" and holding that executive power in any particular instance falls "at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition"). Writing for the Court, then-Justice Rehnquist relied on congressional acquiescence in the specific presidential action, the existence of general legislation in the area, and a history of unchecked executive practice to conclude that Congress had endorsed the President's initiative, elevating the President's power to its height within *Youngstown*'s three-part framework. *Id.* at 679.[6]

---

[6]The Court first found that the International Emergency Economic Powers Act ("IEEPA") specifically authorized the President to liquidate attachments against the Iranian government by U.S. nationals and to require their return to Iran. Although neither the IEEPA nor the so-called Hostage Act explicitly authorized suspension and transfer of private claims from U.S. courts by the Executive Branch, the Court found those statutes "highly relevant in the looser sense of indicating congressional acceptance of a broad scope for executive action" that implied congressional consent. *Id.* at 677.

However many possible stopping points there may be along the spectrum of presidential power, Senate ratification of a treaty clearly falls at one end, as a form of explicit congressional authorization. Ratification eliminates any concern that the Executive Branch is acting at cross-purposes with the Legislative Branch. Thus, under the Court's reasoning in *Dames & Moore*, the long history of executive action to enforce treaty obligations supports presidential action to enforce the judgment of an international tribunal that has been authorized by treaty, even when that action encompasses review of pending claims in U.S. state courts.

Most recently, in *American Insurance Ass'n v. Garamendi*, the Court found that the President's agreement with Germany to refer Holocaust-era insurance claims to an international tribunal for settlement preempted a California law that required insurance companies doing business in California to disclose to the insurance commissioner certain information about Holocaust-era insurance policies. 539 U.S. 396, 420–25 (2003). Preemption was warranted, the Court explained, because the California law clearly conflicted with the express federal policy reflected in enforcing the executive agreement. Under such circumstances, giving effect to California's law would "undercut[] the President's diplomatic discretion and the choice he has made exercising it." *Id.* at 423–24.[7]

In sum, throughout our history, this Court has upheld the presidential exercise—with explicit or tacit congressional approval—of executive power to further diplomatic relations with foreign nations by determining the domestic legal rights of U.S. entities *vis-à-vis* those nations and their citizens. When the claims of private individuals "have become issues in international diplomacy," this Court stated in *Garamendi*,

---

[7] *Cf. Pink*, 315 U.S. at 232 ("If state action could defeat or alter our foreign policy, serious consequences might ensue" and "[t]he nation as a whole would be held to answer if a State created difficulties with a foreign power.").

their settlement by the President "may well be just as essential . . . as diplomacy to settle claims against foreign governments." 539 U.S. at 416. This Court has just as consistently affirmed that Executive Branch agreements with foreign governments to resolve disputes that affect claims of specific individuals preempt conflicting state law. *Id.* at 416–17; *see also Pink*, 315 U.S. at 223, 230–31; *Belmont*, 301 U.S. at 327, 331.

In this case, the presidential action rests on even stronger constitutional footing, because, as discussed above, the President issued the *Avena* Directive pursuant to not one, but three, treaties that had been ratified by a two-thirds majority of the Senate—the U.N. Charter with its annexed ICJ Statute, the Vienna Convention, and the Optional Protocol. These treaties, in combination, authorize the ICJ to issue a binding resolution of an interstate dispute arising under the Vienna Convention. When the President took steps to effectuate the ICJ's *Avena* decision pursuant to these multiple layers of legislative authorization, under Justice Jackson's reasoning in *Youngstown*, his executive power stood at its zenith, as his actions were "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Youngstown*, 343 U.S. at 871 (Jackson, J., concurring).

Indeed, not only did the President act pursuant to Senate authorization in the form of ratified treaties, but he also issued the *Avena* Directive against a backdrop of prior congressional acquiescence in presidential enforcement of ICJ judgments rendered under those and similar treaties.[8]

---

[8] For example, as in the Optional Protocol, the United States agreed in a treaty with Canada that ICJ border determinations would be final and binding. After the ICJ issued one such maritime border resolution, *see Case Concerning Delimitation of Maritime Boundary in Gulf of Maine Area (Can. v. U.S.)*, No. 67, 1984 I.C.J. 246 (Oct. 12, 1984), the Executive Branch directly enforced the resolution against its own

Significantly, Congress has never objected to this claimed presidential authority to enforce ICJ judgments, thus demonstrating a "history of congressional acquiescence" that further supports the President's claim of authority under these particular treaties. *Dames & Moore*, 453 U.S. at 678.

In attacking the *Avena* Directive, therefore, Texas bears a heavy burden of persuasion, which it cannot carry. The *Avena* Directive intruded upon Texas's state authority only to the minimum extent necessary to fulfill the United States' treaty obligation to comply with the ICJ ruling in *Avena*. The President's February 2005 determination simply repeated the ICJ's requirement that domestic courts review and fully evaluate whether admitted violations of the Vienna Convention had prejudiced the fifty-one identified Mexican nationals in their efforts to defend themselves in criminal proceedings. The President's directive neither directed the state courts how to rule, nor divested them of their traditional judicial authority to resolve the underlying claims of those defendants seeking to overturn their convictions.

---

nationals caught fishing in Canadian waters. *See In re Mich. Fishing Corp.*, 6 O.R.W. 380, 1991 WL 288726 (N.O.A.A. May 9, 1991) (imposing $10,000 civil fine for violation of fishing boundary established by ICJ); *In re Makie*, 5 O.R.W. 546, 1989 WL 265326 (N.O.A.A. Aug. 31, 1989) (imposing $5,000 fine for violation of treaty boundary). The Executive Branch also undertook to comply with the ICJ's ruling in the *LaGrand Case* (*F.R.G. v. U.S.*), No. 104, 2001 I.C.J. 466 (June 27, 2001), by advising federal, state, and local officials that the Vienna Convention protocols regarding consular notification were binding law. *Id.* at 511–12 (summarizing actions taken by the Executive Branch). These actions were sufficient to moot Germany's claims for ongoing relief, and have continued. *See, e.g.*, U.S. Dep't of State, Bureau of Consular Affairs, *Consular Notification and Access: Instructions for Federal, State, and Other Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, pt. 3, Questions About Failure to Notify, *available at* http://www.travel.state.gov/law/consular/consular_748.html#failure (last visited June 27, 2007).

This Court has long held that the Executive Branch has authority to determine whether a treaty remains in force. *See Terlinden v. Ames*, 184 U.S. 270, 285–86 (1902). In *Sanitary District v. United States*, this Court further held that the United States had the authority to sue a State, even in the absence of congressional authorization, to enforce a treaty with Great Britain concerning the level of water in the Great Lakes. 266 U.S. 405, 425–26 (1925). As the Court explained soon thereafter, the Executive has the "right to invoke the aid of a court of equity in removing unlawful [state] obstacles to the fulfillment of its [treaty] obligations." *United States v. Minnesota*, 270 U.S. 181, 194 (1926). If the President has the power to sue a State or local government to force its compliance with the nation's treaty obligations, surely he must also possess the power to require the States to implement a binding ICJ judgment without resorting to disruptive litigation.

II. TEXAS MUST COMPLY WITH TREATY OBLIGATIONS TO GIVE EFFECT TO DECISIONS OF THE ICJ, EVEN APART FROM THE PRESIDENT'S *AVENA* DIRECTIVE

A. The Supremacy Clause Binds Texas To Obey The Nation's Treaty Commitments

Even absent the President's *Avena* Directive, Texas is bound by the Supremacy Clause to observe U.S. treaty commitments under Article 36 of the Vienna Convention, Article I of the Optional Protocol, Article 94 of the U.N. Charter, and Article 59 of the ICJ Statute.

The Vienna Convention is a self-executing treaty—it needs no domestic legislative action to render it enforceable as U.S. law. *See Jogi v. Voges*, 480 F.3d 822, 830–31 (7th Cir. 2007).[9] The Vienna Convention thus represents a treaty

---

[9] Before the Senate gave its advice and consent to the Convention, the State Department Legal Adviser testified before the Senate Committee on Foreign Relations that the Convention was entirely self-executing and

"made . . . under the Authority of the United States, [which] shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby.*" U.S. Const., art. VI, cl. 2 (emphasis added); *see also Sanchez-Llamas*, 126 S. Ct. at 2680 ("[A] self-executing treaty binds the States [to] recognize [its] force in the course of adjudicating the rights of [individual] litigants," and where that treaty "provides for a particular judicial remedy," "[c]ourts must apply th[at] remedy as a requirement of federal law."). Article 36 of the Vienna Convention grants individuals such as Petitioner a right to consular access. This provision does not simply confer on state parties a right that they may exercise for the benefit of their citizens, but rather plainly declares that authorities "shall inform *the person concerned* without delay of *his rights* under this sub-paragraph." Vienna Convention, *supra*, art. 36(1)(b) (emphasis added). The drafting history of that provision,[10] and the Justice Department's regulations on consular notification,[11] similarly confirm that Article 36 confers a right on the individual alien.

"did not require implementing . . . legislation to come into force." S. Exec. Rep. No. 91-9 app. at 5 (1969).

[10] During negotiations, Venezuela proposed eliminating the reference to an individual right, but that proposal met with strong opposition. For its part, the United States proposed language intended to "protect the right of the national concerned." 2 United Nations Conference on Consular Relations: Official Records 37, 38, 84, 85, 331–34, 337, U.N. Doc. A/Conf. 2 5/6, U.N. Sales No. 63.X.2 (1963). The language quoted above was adopted by a vote of sixty-five to two (with twelve abstentions). Justice O'Connor, noting this language, observed that, "if a statute were to provide, for example, that arresting authorities 'shall inform a detained person without delay of his right to counsel,' I question whether more would be required before a defendant could invoke that statute to complain in court if he had not been so informed." *Medellin v. Dretke*, 544 U.S. 660, 687 (2005) (O'Connor, J., dissenting from dismissal of writ of certiorari as improvidently granted).

[11] Section 50.5(a) states that an individual alien has the right to ask law-enforcement authorities *not* to contact consular officials—a right that by definition can belong only to the alien and not to the alien's

The U.N. Charter, with the annexed ICJ Statute, constitutes a separate and independent treaty obligation that equally bind Texas. Under Article 94(1) of the Charter, a U.N. Member assumes a solemn obligation to "comply with the decision of the [ICJ] in any case to which it is a party." When the ICJ renders a decision regarding treaty rights, as it did in *Avena*, that decision is considered binding "between the parties *and* in respect of that particular case." ICJ Statute, *supra*, art. 59; *see also Bosnian Genocide Case*, 2007 I.C.J. No. 91, ¶ 123 (confirming that the operative part of an ICJ judgment has the force of *res judicata*). The ICJ has jurisdiction to render a decision when state parties provide their consent to jurisdiction, for example, by a treaty that imparts standing consent such as the Optional Protocol. *See* ICJ Statute, *supra*, art. 36(1); Optional Protocol, *supra*, art. I (accepting the compulsory jurisdiction of the ICJ for "[d]isputes arising out of the interpretation or application of the [Vienna] Convention").

At the time of the *Avena* decision, the United States had duly ratified the U.N. Charter, with the annexed ICJ Statute, the Vienna Convention, and the Optional Protocol, all in accordance with Article II of the Constitution. Accordingly, the United States had undertaken to comply with any forthcoming ICJ decision on the Vienna Convention—an undertaking with which, under the Supremacy Clause, the state courts were obligated to comply "in respect of [Petitioner's] particular case."[12]

---

government. *See* 28 C.F.R. § 50.5. The *Foreign Affairs Manual* issued by the State Department also says that "Article 36 of the [Vienna Convention] provides that the host government must notify a foreign national arrestee without delay of the arrestee's *right* to communicate with his or her consular officials." 7 U.S. Dep't of State, *Foreign Affairs Manual* § 421.1-1 (emphasis added).

[12] By its terms, the *Avena* decision obligates state courts to "review and reconsider[] the convictions and sentences of the Mexican nationals referred to" in that decision, "whatever may be the actual outcome of such review" and notwithstanding any "procedural default rule." *Avena*,

Nothing in this Court's recent decisions regarding the Vienna Convention casts doubt on Petitioner's assertion that the ICJ's *final judgment* on the merits of *the particular cases before it* fully binds those state courts that have jurisdiction over the individuals named in *Avena*.[13] The judicial remedy ordered by the ICJ in *Avena*—that U.S. domestic courts must "review and reconsider[]" Medellin's conviction and

---

2004 I.C.J. at 56–57, 63–66, 72. "[W]here a treaty is the law of the land, and as such affects the rights of parties litigating in court, that treaty as much binds those rights and is as much to be regarded by the court as an act of Congress." *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) (Marshall, C.J.).

[13] In *Breard v. Greene*, a Paraguayan national who had been denied his Vienna Convention rights sought to rely upon a *provisional order* of the ICJ, which "request[ed] that the United States 'take all measures'" to delay his execution. 523 U.S. 371, 374 (1998) (per curiam). Because the petitioner had procedurally defaulted his Vienna Convention claim under state law, the Court denied his petition. The Court intimated, however, that a final award on the merits by the ICJ might have led to a different result. *See id.* at 378 (acknowledging the "unfortunate" fact that "this matter comes before us while proceedings are pending before the ICJ that might have been brought to that court earlier").

In *Sanchez-Llamas*, a habeas petitioner sought to invoke the ICJ's decision in *Avena* to excuse the procedural default of his Vienna Convention claims, even though he was not among the fifty-one individuals mentioned by name in the ICJ proceedings. Because petitioner Sanchez-Llamas was not a party to the *Avena* decision, he could not avail himself of the *Avena decision's* binding effect; he could only put forward a claim based on the ICJ's *interpretation* of the Vienna Convention. 126 S. Ct. at 2677–78. Noting that "[t]he ICJ's principal purpose is to arbitrate *particular disputes* between national governments," this Court held that, while the ICJ's *interpretation* of the Vienna Convention deserved "respectful consideration," it was not binding in Sanchez-Llamas's case. *Id.* at 2683–84. But nothing in *Sanchez-Llamas* suggests that *Avena* does not bind Texas as to the fifty-one Mexican nationals, including Petitioner Medellin, whose "particular dispute[]" the ICJ arbitrated in that case. *See* Brief of United States as *Amicus Curiae* Supporting Petitioner at 20, *Medellin v. Texas*, No. 06-984, 2007 WL 923105 (Mar. 22, 2007) (distinguishing *Sanchez-Llamas* from the present case as "not resolv[ing] the question" presented here).

sentence without regard to procedural-default bars—represents an international obligation of the United States that the Texas courts are not free to disregard.

B. The Treaty Power Exists In Its Present Form Precisely Because The Framers Wished To Keep States From Interfering With The National Government's Conduct Of Foreign Relations

The ruling of the Texas Court of Criminal Appeals in this case violates ratified treaties and so offends the Framers' constitutional vision by promoting precisely the kind of diplomatic failure that prompted the creation of the treaty power in the first place. The Framers established the treaty power, U.S. Const., art. II, § 2, cl. 2, to correct their frustrating experience under the Articles of Confederation.[14] That experience taught that permitting the States to impair the nation's treaty obligations would significantly impede the conduct of the fledgling nation's foreign affairs.

Under the Articles of Confederation, the Continental Congress possessed the treaty power, but virtually all legislative authority rested with the States.[15] This structure left Congress nominally responsible for foreign affairs, but ultimately depended on the good faith of the States to carry

---

[14] *See generally* Frederick W. Marks III, *Independence on Trial, Foreign Affairs and the Making of the Constitution* (1973) (explaining that the difficulty of obtaining state compliance with treaties motivated the Constitutional Convention); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1102–49 (2000) (reviewing history).

[15] Article IX of the Articles of Confederation granted Congress sole and exclusive power to make treaties and alliances, but subject to the restriction "that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever." Articles of Confederation and Perpetual Union, art. IX.

out treaty obligations. *See generally* Samuel B. Crandall, *Treaties, Their Making and Enforcement* [illegible]–43 (1904). This dysfunctional arrangement caused repeated failures for Congress in its diplomatic endeavors.

The most prominent failure involved the Treaty of Peace with Great Britain of 1783, which had secured both the independence of the United States of America and the new country's claim to expansive boundaries. The Treaty of Peace was quickly attacked on the ground that its principal concessions to the British—financial and amnesty provisions—infringed upon the authority of the States.[16] Almost immediately, a number of state legislatures passed laws that contradicted those provisions. Tensions with Great Britain subsequently worsened, and the treaty's efficacy was seriously jeopardized—so much so that the British refused to carry out their reciprocal obligation to withdraw troops from military posts in the northwestern territory. Crandall, *supra*, at 40–42. The States continued their fractious behavior in connection with diplomatic efforts to establish commercial relations, and other nations became openly skeptical of the trustworthiness of the United States as a treaty partner.[17]

---

[16] Article IV of the Treaty provided, *inter alia*, that all debts owed to British creditors that had been extinguished under state law would be resuscitated. Treaty of Peace with Great Britain, Sept. 3, 1783, 12 Bevans 8, 11. Article VI provided that there would be no further confiscations, prosecutions, or other actions taken against Loyalists and that those Loyalists still in prison would be released. *Id.* at 12.

[17] Indeed, foreign skepticism about the Continental Congress's ability to enter binding treaties limited that body's ability to negotiate any commercial treaties aside from a limited treaty with Prussia. *See* Golove, *supra*, at 1131. For example, in response to the American commissioners' request to open commercial treaty negotiations with Great Britain, the Duke of Dorset replied:

> I have been . . . instructed to learn from you, gentlemen, what is the real nature of the powers with which you are invested—whether you are merely commissioned by Congress, or whether you have received separate powers from the respective States . . . . [R]epeated

The ensuing diplomatic paralysis motivated the Framers to redefine the treaty power to repair what Madison called the "constant tendency in the States . . . to violate national Treaties." 1 *The Records of the Federal Convention of 1787*, at 164 (Max Farrand ed., rev. ed. 1937). Alexander Hamilton echoed the same concern in *The Federalist* No. 22: "The faith, the reputation, the peace of the whole Union are . . . continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed."

To ensure predictable national compliance with treaties, the Framers drafted three constitutional provisions establishing that treaties would bind the States and supersede conflicting provisions of state law. The Treaty Clause of the U.S. Constitution gave the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. art. II, § 2, cl. 2. Article I, Section 10 specified that the federal power in this connection was exclusive: "No State shall enter into any Treaty, Alliance, or Confederation." *Id.* art. I, § 10, cl. 1. Finally, the Supremacy Clause declared that the Constitution, the laws of the United States made pursuant thereto, and "all Treaties made, or which shall be made, under the Authority of the

---

> experience having taught . . . how little the authority of Congress could avail in any respect . . . .

1 George Ticknor Curtis, *History of the Origin, Formation, and Adoption of the Constitution of the United States* 289–90 n.1 (1854) (quoting Letter from Duke of Dorset to American Commissioners (Mar. 26, 1785)). Likewise, Lord Sheffield contended:

> No treaty can be made with the American States that can be binding on the whole of them. The act of Confederation does not enable Congress to form more than general treaties: at the moment of the highest authority of Congress, the power in question was with-held by the several States.

Golove, *supra*, at 1128 (quoting John Lord Sheffield, *Observations on the Commerce of the American States* 199-200 (Dublin, Luke White 2d ed. 1784)).

United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby.*" *Id.* art. VI, cl. 2 (emphasis added).

As the text and structure of these provisions make plain, where our nation's foreign policy is concerned, the Constitution does not recognize dual sovereignty. *See, e.g.*, *The Federalist* No. 42 (James Madison) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."). One of the first treaties ratified by the new American government reflected this broad treaty power. A Consular Convention with France, ratified by the first Senate in 1789, was a bilateral precursor to the modern-day Vienna Convention on Consular Relations. *See* Convention Defining and Establishing the Functions and Privileges of their Respective Consuls and Vice Consuls, Nov. 14, 1788, U.S.-France, 8 Stat. 106, 7 Bevans 794. In ratifying the treaty, the Senate made clear that it was acting under its authority to bind the States and to supersede state laws in areas that otherwise fell within the States' legislative province. *See* Golove, *supra*, at 1149–50 & nn. 223, 225.

This Court has since consistently enforced our nation's binding international obligations, notwithstanding contrary state laws. In *Ware v. Hylton*, for example, the Court held that Article IV of the Treaty of Peace—which ensured British creditors that they would "meet with no lawful impediment to the recovery" of debts—nullified a conflicting Virginia statute that permitted such debts to be discharged. 3 U.S. (3 Dall.) 199, 235, 239 (1796). In *Hauenstein v. Lynham*, 100 U.S. 483 (1879), this Court held that a treaty between the United States and the Swiss Confederation superseded inconsistent state law. Similarly, in *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924), the Court ruled that a treaty "will be applied and given authoritative effect by the courts," even in the face of an inconsistent city ordinance. In *Belmont*, this Court memorably wrote that "[i]n respect of all international negotiations and compacts,

and in respect of our foreign relations generally, . . . the state of New York does not exist." 301 U.S. at 331. And in *Pink*, the Court reiterated that "state law must yield when it is inconsistent with, or impairs the policies or provisions of a treaty or of an international compact or agreement. . . . No State can rewrite our foreign policy to conform to its own domestic policies." 315 U.S. at 230–31, 233.

III. TEXAS'S REFUSAL TO COMPLY WITH THE VIENNA CONVENTION, THE *AVENA* DECISION, AND THE PRESIDENT'S *AVENA* DIRECTIVE UNDERMINES U.S. DIPLOMATIC CREDIBILITY AND DAMAGES U.S. FOREIGN POLICY INTERESTS

The vesting of authority to enforce treaties in the federal government effectuates not just a constitutional mandate, but also a critical foreign policy function. Federal treaty enforcement benefits our nation by enabling us more effectively to engage in relations with other nations and to protect the interests of our citizens.[18] As this Court recently recognized in *Crosby*: "Quite simply, if [an inconsistent state] law is enforceable the President has less to offer and less economic diplomatic leverage as a consequence." 530 U.S. at 377.[19]

---

[18] *Cf. Belmont*, 301 U.S. at 331 (relying on Madison's statement during the constitutional debates that "[t]o counteract [a treaty] by the supremacy of the state laws, would bring on the Union the just charge of national perfidy, and involve us in war" (internal quotation marks omitted)).

[19] In *Crosby*, this Court faced a Massachusetts law that threatened to invite World Trade Organization (WTO) enforcement action by the European Union. While "express[ing] no opinion on the merits of [those] proceedings," the Court struck down the offensive state law, at least partly because an adverse WTO complaint against the United States would serve to "embroil the National Government . . . in international dispute proceedings" and "threaten[] relations with the United States." *Id.* at 383 & n.19.

For a compelling example, this Court need look no further than the diplomatic upheaval surrounding the States' well-publicized noncompliance with the Vienna Convention. In the years leading up to the *Avena* decision, the persistent noncompliance of the several States provoked extensive diplomatic protest both from foreign allies[20] and from

---

[20] *See, e.g.*, Brian Knowlton, *Execution Pits Mexico Against U.S.; Fox Echoes World on the Death Penalty*, Int'l Herald Trib., Aug. 16, 2002, at 1 (reporting Mexican President Fox's cancellation of a trip to President Bush's Texas ranch as "an unequivocal signal of rejection of the execution" of a Mexican national who had not been informed of his consular rights); Ginger Thompson, *An Execution in Texas Strains Ties with Mexico and Others*, N.Y. Times, Aug. 16, 2002, at A6 (citing call from President Fox of Mexico); Raymond Bonner, *Mexican Killer is Refused Clemency by Oklahoma*, N.Y. Times, July 21, 2001, at A8 (quoting Mexican government as declaring that execution of Mexican national denied Vienna Convention rights was "contrary to international law and the elemental principles of cooperation between nations"); Roger Cohen, *U.S. Execution of German Stirs Anger*, N.Y. Times, Mar. 5, 1999, at 14 (quoting German Justice Minister's declaration that the execution of two German nationals whose Vienna Convention rights had been violated by state officials "is barbaric and unworthy of a [nation] based on the rule of law"); George Boehmer, *Killer Loses Fight for Life*, Daily Telegraph (Sydney, Australia), Mar. 4, 1999, at 25 (quoting the German Parliament's Human Rights Committee Chairman Roth's reaction to the LaGrand execution: "When (Secretary of State Madeleine) Albright talks of human rights, for example in China, she must prove her credibility by also taking human rights in the United States seriously."); David Schwartz, *Plan to Execute German Killers Attracts Scrutiny*, Dallas Morning News, Feb. 22, 1999, at A1 (describing efforts by then-German President Herzog, Chancellor Schroeder, Foreign Minister Fischer, and Ambassador Chrobog to gain support for clemency from President Clinton and Arizona Governor Hull for Germans on death row); Colin Nickerson, *Canadians Protest a Texas Execution; Inmate Set to Die Today for 1975 Killing*, Boston Globe, Dec. 10, 1998, at A2 (describing statements by Canadian government officials responding to execution of Canadian citizen [illegible] Faulder, who had been denied consular rights); Amnesty Int'l, *The Execution of Angel Breard: Apologies Are Not Enough*, *available at* http://web.amnesty.org/library/Index/engAMR510271998 (May 1, 1998) (quoting Paraguayan Deputy Foreign Minister Rachid: "[T]here is not an international summit at which they [the U.S. government] do not preach the preservation of

intergovernmental human rights bodies.[21] In the year between the ICJ's final decision in *Avena* and the President's *Avena* Directive, that diplomatic criticism only intensified.[22]

---

human rights. . . . [T]he United States has been the champion of democracy . . . let them be the first one to demonstrate to us the principles of democracy; let them also respect human rights."); David Stout, *Do as We Say, Not as We Do: U.S. Executions Draw Scorn from Abroad*, N.Y. Times, Apr. 26, 1998, § 4 (Week in Review), at 4 (quoting Honduran newspaper upon execution of Honduran national denied rights under the Vienna Convention: "The most powerful country in the world, which claims to be a stickler for justice and legal rectitude, has violated its own precepts."); Laura LaFay, *World Court—U.S. to Halt Execution*, Virginian-Pilot, Apr. 10, 1998, at A1 (describing protests by Mother Teresa, Pope John Paul II, and Italian government against execution of Italian citizen); Somini Sengupta, *Appeal in Murder Cites International Treaty*, N.Y. Times, Dec. 23, 1997, at B5 (letter from Ecuadorean Consul General).

[21] *See, e.g.*, *Ramón Martinez Villareal v. United States*, Case 11.753, Report No. 52/02, Inter-Am. C.H.R., ¶¶ 69–70 (2002) (describing notification of right to consular assistance as "among the minimum guarantees essential for foreign nationals also to adequately prepare their defense and receive a fair trial" and finding that failure to give notice of such rights violated due process); *Resol. On the Death Sentence Handed Down on Greg Summers in Texas, USA*, B4-0188/99, 1999 O.J. (C 150) 383-84 (passing resolution condemning persistent U.S. failure to notify foreign nationals of rights to consular access and noting "demonstrably extremely poor quality" of defense counsel in case of two German brothers on death row who had not had consular assistance); Kevin Sullivan, *Mexico Challenges U.S. on Death Penalty Cases*, Wash. Post, Jan. 10, 2003, at A17 (citing concerns expressed by U.N. High Commissioner for Human Rights regarding the execution of Javier Suarez Media, a Mexican citizen, because Texas authorities denied him his rights under the Vienna Convention).

[22] *See, e.g.*, *Oklahoma Gov. Commutes Mexican's Death Sentence*, Reuters, May 14, 2004 (citing testimony of the Mexican Ambassador to the United States before an Oklahoma parole board, and a letter from Mexican President Vicente Fox to the Governor of Oklahoma, urging the commutation of a Mexican national's death sentence due to the failure of state authorities to notify him of his Vienna Convention rights); *Mexico's Fox to Insist US Honor World Court Ruling*, Reuters, April 4, 2004 (quoting Mexican President Vincente Fox as "insist[ing]" the United States comply with the *Avena* decision as an "act of elemental justice").

Perhaps in no other area of our foreign policy have *amici* so consistently heard foreign heads of state, foreign ministers, and foreign ambassadors pleading for the enforcement of U.S. treaty obligations. When an international obligation is plain, as it was when *Avena* was rendered, "statements of foreign powers, . . . indications of concrete disputes with those powers, [and] formal diplomatic protests" are relevant factors in assessing whether state actions will "stand[] in the way of [national] diplomatic objectives." *Crosby*, 530 U.S. at 385–86.

In *amici's* experience, the persistent denial of treaty rights by the States significantly impaired their ability, in various diplomatic roles, to carry out other foreign policy initiatives. For nearly a decade, *amici* recall, important time at bilateral and multilateral meetings was diverted to answering diplomatic demarches challenging practices of the several States under the Vienna Convention. Not only has this issue drawn valuable attention away from core national foreign policy interests, but it has also affected *amici*'s ability to address these interests effectively,[23] and needlessly cost the United States valuable positions of human rights leadership.[24] In a 1998 letter to the Governor of Virginia

---

[23] For example, during public demonstrations in front of the U.S. embassy in Honduras to protest the execution of a Honduran who had not been given timely access to the consular officials, more than 4,000 U.S. personnel, including diplomatic staff, had to be protected by armed security. *See U.S. Boosts Security in Honduras as Tempers Flare*, Reuters, Apr. 24, 1998. After the execution of Tristan Montoya, a Mexican who had been denied his rights under the Vienna Convention, Mexicans issued death threats and U.S. tourists were given warnings to stay out of certain areas. Armando Villafranca, *Life and Death Chasm*, Hous. Chron., Sept. 28, 1997, at A1.

[24] Shortly after the execution of two German nationals denied their Vienna Convention rights despite a provisional order of the ICJ, the United States was voted off the U.N. Commission on Human Rights in 2001 for the first time in that body's 54-year history. Barbara Crossette, *For First Time, U.S. Is Excluded from U.N. Human Rights Panel*, N.Y. Times, May 4, 2001, at A1. The United States likewise failed to win a

regarding the pending execution of a Paraguayan national denied consular access under the Convention, one signatory to this brief, former Secretary of State Madeleine Albright, explained that she was "particularly concerned about the possible negative consequences" for the United States' international interests. Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998), *quoted in* Jonathan I. Charney & W. Michael Reisman, *Agora: Breard*, 92 Am. J. Int'l L. 666, 671–72 (1998). "The execution of Mr. Breard in the present circumstances," she observed, "could lead some countries to contend incorrectly that the U.S. does not take seriously its obligations under the Convention" and "could be seen as a denial by the United States of the significance of international law." *Id.* Were this Court now to authorize the Texas courts to ignore our obligations under the Vienna Convention and related treaties, our diplomatic partners would inevitably lose confidence in our international commitments and the ambassadors who offer them, particularly insofar as those commitments rely upon domestic courts for enforcement.

To allow state courts to deny individual rights protected by self-executing treaties, by a decision of the ICJ to which the United States agreed to be bound, and by a specific presidential directive implementing that decision would seriously hinder the broad spectrum of America's diplomatic efforts. Left undisturbed, the reasoning of the Texas judges could potentially disrupt a wide array of existing and future treaty regimes. Increasingly, private interests are the subject of international compacts, and domestic litigants can invoke

---

seat on the Inter-American Commission on Human Rights for the first time since that body's inception in 1959, and its observer status in the Council of Europe—which bans executions—has been put in jeopardy. Connie de la Vega, *Going It Alone*, Am. Prospect, July 2004, at A22.

treaties as a rule of decision before domestic courts.[25] This Court has acknowledged, for example, that treaties governing international transportation by air, inheritance, and extradition provide substantive legal rules for private disputes that arise within their coverage. *See, e.g.*, *Olympic Airways v. Husain*, 540 U.S. 644, 649 (2004) (acknowledging that Article 17 of the Warsaw Convention concerning air travel provides the basis for an individual cause of action in tort); *Kolovrat v. Oregon*, 366 U.S. 187, 192–94 (1961) (permitting a foreign national to invoke a treaty-based right to inherit U.S. property in the same manner as U.S. citizens); *Rauscher*, 119 U.S. 407 (holding that the provisions of an extradition treaty could serve as a defense to the attempted prosecution of another crime). The compulsory adjudication of disputes before international tribunals has also emerged as a core feature of our foreign relations. Nearly seventy treaties now in force call for mandatory resort to the ICJ,[26] and many others include

---

[25] The Vienna Convention and its Optional Protocol are hardly *sui generis* in this regard. This Court has long recognized that both customary international law, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 714–17 (2004), and treaties, *United States v. Rauscher*, 119 U.S. 407, 418–20, 430–31 (1886), may give rise to individual rights that "partake of the nature of municipal law, . . . which are capable of enforcement as between private parties in the courts of [a signatory] country." *Rauscher*, 119 U.S. at 417–18 (citing the *Head Money Cases*, 112 U.S. 580, 598 (1884)).

[26] Fred L. Morrison, *Treaties as a Source of Jurisdiction, Especially in U.S. Practice*, *in* The International Court of Justice at a Crossroads 58–81 (Lori F. Damrosch ed., 1987). Treaties establishing jurisdiction in an international tribunal have a long history in U.S. foreign policy. *See, e.g.*, Great Britain-USA, Treaty of Amity, Commerce, and Navigation ("Jay Treaty") (1795), 8 Stat. 116; Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, U.S.-Italy, art. XXVI, 63 Stat. 2255, 2294, 79 U.N.T.S. 171, 212; Universal Copyright Convention, *opened for signature* Sept. 6, 1952, art. XV, 6 U.S.T. 2731, 2743, 216 U.N.T.S. 132, 146; Patent Cooperation Treaty, *opened for signature* June 19, 1970, art. 59, 28 U.S.T. 7645, 7708, 1160 U.N.T.S. 231, 262; International Air Transport Agreement, *opened for signature* Dec. 7, 1944, art. IV, sec. 3,

provisions for binding, international resolution of disputes concerning private commercial interests.[27] In a global

---

3 Bevans 922, 925, 84 U.N.T.S. 389, 394; Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, ch. XVIII, ar. 84, 3 Bevans 944, 966, 15 U.N.T.S. 295, 352. Indeed, the United States has not hesitated to institute proceedings before the ICJ under these treaties and on behalf of domestic companies, even when their private claims could arguably have been brought in the courts of another signatory country. *See, e.g.*, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)*, No. 76, 1989 I.C.J. 15 (July 20, 1989) (suit for breach of the FCN treaty).

[27] *See, e.g.*, North American Free Trade Agreement, ch. 11, Sept. 6, 1992, 32 I.L.M. 605, 639 (1993). American investors have initiated arbitral proceedings under NAFTA against the government of Canada eight times, and against the government of Mexico twelve times, with at least five of those cases resulting in compensation for the American investors. For a list of past and pending NAFTA Chapter Eleven cases, *see* U.S. Dep't of State, NAFTA Investor-State Arbitrations, http://www.state.gov/s/l/c3439.htm (last visited June 27, 2007), and Canada Department of Foreign Affairs and International Trade, NAFTA-Chapter 11-Investment, http://www.dfait-maeci.gc.ca/tna-nac/other/invest-en.asp#nafta (last visited June 27, 2007). *See also* Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU) of the World Trade Organization, *entered into force* Jan. 1, 1995, art. 23(1), *in* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, Apr. 15, 1994, 33 I.L.M. 1125, 1241 (1994). In the DSU, WTO members agree to submit to binding arbitration of certain trade disputes, and are under an obligation "to have recourse to and abide by the rules and procedures" of the DSU. The United States has been the complainant in seventy-four of the 324 disputes that have been initiated before WTO tribunals. For a full list of past and pending DSU cases, *see* World Trade Organization, Chronological list of dispute cases, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm (last visited June 27, 2007). The decisions of these tribinals are generally honored by domestic courts and authorities. *See, e.g.*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 759–62 (2004) (detailing the President's compliance with an adverse NAFTA panel decision regarding U.S. trade laws against Mexican motor carriers); *Canada v. S.D. Myers, Inc.*, 2004 Fed. C.C. LEXIS 20, at *15–16 (Fed. Cl. Jan. 13, 2004) (affording a "high level of deference" to a NAFTA Tribunal in affirming a $7 million award to an American investor against the Canadian government, "so as to be sensitive to the need of a system for predictability in the resolution of disputes"); President's Statement on

climate where general compliance with international judgments is anticipated, "[m]any cases are settled before a final judgment is reached," giving these international judicial bodies "an important 'pacifying effect' on disputes at all stages of litigation."[28]

Amici submit that the ability of the United States both to secure new treaty regimes to help us realize our national interests and to secure reliable enforcement of existing treaty regimes will depend critically on our reputation for honoring those commitments we have already undertaken. Because "international law is founded upon mutuality and reciprocity," *Hilton v. Guyot*, 159 U.S. 113, 228 (1895), the prospect of future agreements will depend critically on whether our state courts are perceived as honoring the President's directives and the three binding treaties at issue here. Given these trends, the need has never been greater for this Court to mandate reliable state judicial enforcement of America's solemn treaty obligations.

CONCLUSION

For all of the foregoing reasons, *amici* urge the Court to reverse the decision below.

Steel, *available at* http://www.whitehouse.gov/news/releases/2003/12/20031204-5.html (Dec. 4, 2003) (withdrawing trade import tariffs on steel after an adverse decision by the WTO Appellate Body) (last visited June 27, 2007).

[28] Colter Paulson, *Compliance with Final Judgments of the International Court of Justice Since 1987*, 98 Am. J. Int'l L. 434, 436 (2004). Even nations with longstanding histories of extreme hostility toward one another have reached agreement on serious diplomatic disputes after referral (or threat of referral) to the ICJ. *See, e.g., Trial of Pakistani Prisoners of War (Pak. v. India)*, No. 60, 1973 I.C.J. 328 (July 13, 1973), and 1973 I.C.J. 347 (Dec. 15, 1973) (dispute settled out of court); *Case Concerning Aerial Incident of July 3, 1988 (Iran v. U.S.)*, No. 79, 1989 I.C.J. 132 (Dec. 13, 1989), and 1996 I.C.J. 9 (Feb. 2, 1962) (dispute settled out of court).

Respectfully submitted,

DONALD B. AYER
CHARLES R.A. MORSE
CHRISTIAN G. VERGONIS
CHARLES T. KOTUBY, JR.
JONES DAY
51 Louisiana Ave., NW
Washington, D.C. 20001
(202) 879-3939

HAROLD HONGJU KOH
(*Counsel of Record*)
HOPE R. METCALF
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN
RIGHTS CLINIC—NATIONAL
LITIGATION PROJECT
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06510
(203) 432-1660

Counsel for Amici Curiae

June 28, 2007

APPENDIX

APPENDIX - LIST OF *AMICI*

Madeleine K. Albright served as U.S. Secretary of State from 1997-2001 and as Permanent Representative to the United Nations from 1993 to 1997. Dr. Albright is the first Michael and Virginia Mortara Endowed Professor in the Practice of Diplomacy at the Georgetown School of Foreign Service and the first Distinguished Scholar of the William Davidson Institute at the University of Michigan Business School. Dr. Albright is the Chairman of The National Democratic Institute for International Affairs and also serves on the Board of Directors of the New York Stock Exchange.

Stephen W. Bosworth is Dean of the Fletcher School of Law and Diplomacy at Tufts University. During his diplomatic career, he served as U.S. Ambassador to the Republic of Korea, U.S. Ambassador to the Philippines, U.S. Ambassador to Tunisia, Director of the State Department Policy Planning Staff, Principal Deputy Assistant Secretary for Inter-American Affairs, and Deputy Assistant Secretary for Economic Affairs. He has also served as Executive Director of the Korean Peninsula Energy Development Organization (KEDO) and President of the United States-Japan Foundation.

Jeffrey Davidow is the president of the Institute of the Americas at the University of California, San Diego. He served as U.S. Ambassador to Mexico from 1998 to 2002, under both President Clinton and President Bush, and as U.S. Ambassador to Zambia (1988-1990), and Venezuela (1993-1996). From 1996 to 1998, he was assistant Secretary of State for Inter-American Affairs. After 34 years in the State Department, he retired with the personal rank of Career Ambassador.

Herbert J. Hansell served as the Legal Adviser of the U.S. Department of State from 1977 to 1979, Member of the

Permanent Court of Arbitration, The Hague, from 1978-1980, and Senior Adviser and Ambassador to the Mideast Peace Negotiations in 1980. He served as Adviser to the United States Trade Representative on international investment in 1980, and as Adviser to the American Law Institute Restatement of the Foreign Relations Law of the United States. He is also Retired Partner at the law firm of Jones Day.

James R. Jones is a partner with Manatt, Phelps and Phillips LLC, and National Chairman of the World Affairs Council of America. From 1973 to 1987, he was a member of the U.S. House of Representatives from Oklahoma. During his tenure in Congress, he was Chairman of the House Budget Committee and a ranking member of the Ways and Means Committee. From 1989 to 1993, he was Chairman and Chief Executive Officer of the American Stock Exchange. He served as the U.S. Ambassador to Mexico from 1993 to 1997, and was awarded by President Ernesto Zedillo the Aztec Eagle Award, the highest award that can be given to a non-Mexican.

James C. O'Brien, a Principal of the Albright Group LLC, served as Special Presidential Envoy for the Balkans from 2000 to 2001, as Principal Deputy Director of the State Department Policy Planning Staff from 1998 to 2000, and as a State Department official from 1989 to 2001.

Thomas R. Pickering served as the Under Secretary of State for Political Affairs from 1997 to 2001, and was the U.S. Ambassador and Permanent Representative to the United Nations from 1989 to 1992. A Career Ambassador, during his diplomatic career, he also served as Assistant Secretary of State for Oceans, Environment and Science, U.S. Ambassador to The Russian Federation, U.S.

Ambassador to India, U.S. Ambassador to Israel, U.S. Ambassador to El Salvador, U.S. Ambassador to Nigeria, U.S. Ambassador to The Hashemite Kingdom of Jordan, and Executive Secretary of the Department and Special Assistant to the Secretary. He was also President of the Eurasia Foundation and Senior Vice President for International Relations of The Boeing Company 2001-2005 and is currently Vice Chairman of Hills & Co.

J. Stapleton Roy is Vice Chairman of Kissinger Associates, Inc. A Career Ambassador, he served as U.S. Ambassador to Indonesia, U.S. Ambassador to the Peoples' Republic of China, and U.S. Ambassador to Singapore. He also served as Assistant Secretary of State for Intelligence and Research, Executive Secretary of the Department and Special Assistant to the Secretary, and as Deputy Assistant Secretary for East Asian and Pacific Affairs.

Wendy Sherman is a Principal of The Albright Group and former Counselor of the Department of State and Special Advisor to the President and Secretary of State and North Korea Policy Coordinator.

Nancy Soderberg is a Distinguished Visiting Scholar in the Department of Political Science and Public Administration at the University of North Florida. She previously served as Deputy Assistant to the President for National Security Affairs and as the U.S. Ambassador and Representative for Special Political Affairs at the United Nations.

Abraham D. Sofaer is a Senior Fellow at the Hoover Institution, Stanford University, and Professor of Law (by Courtesy) at the Stanford Law School. He served as a federal district judge in the Southern District of New York from 1979 to 1985. From 1985 to 1990 he served as Legal Adviser at the US Department of State.

Strobe Talbott is President of the Brookings Institution. He served as Deputy Secretary of State from 1994-2001, and Ambassador-at-large and Special Advisor to the Secretary of State for the former Soviet Union from 1993-1994.

Malcolm R. Wilkey is a retired Circuit Judge of the U.S Court of Appeals for the D.C. Circuit, where he served from 1970 to 1985, and is a former U.S. Ambassador to Uruguay (1985-90). He also served as Adviser to the American Law Institute Restatement of the Foreign Relations Law of the United States from 1979 to 1986.

Frank G. Wisner is Vice Chairman, External Affairs, at American International Group. A career diplomat with the personal rank of Career Ambassador, he served as Ambassador to India from 1994-1997. Additionally, he held the positions of Ambassador to Zambia (1979-82), Egypt (1986-91), and the Philippines (1991—92). Mr. Wisner has served in a number of positions in the U.S. government, including Undersecretary of Defense for Policy (1993-94), Undersecretary of State for International Security Affairs (1992-93), Senior Deputy Assistant Secretary for African Affairs (1982-86), and Deputy Executive Secretary of the Department of State (1977). During the course of his career, Frank Wisner served in the Middle East and South and East Asia. Today Mr. Wisner is a member of the Boards of Directors of American Life Insurance Company (ALICO), EOG Resources and Ethan Allen, as well as the boards of numerous non-profit organizations. He is an advisor to Kissinger McClarity Associates.